No. 83-724

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IRENE GOMEZ-BETHKE, Commissioner, Minnesota Department of Human Rights; HUBERT H. HUMPHREY III, Attorney General of the State of Minnesota; and GEORGE A. BECK, Hearing Examiner of the State of Minnesota,

Appellants,

—v.—

THE UNITED STATES JAYCEES, a non-profit Missouri corporation, on behalf of itself and its qualified members,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF AMERICAN CIVIL LIBERTIES UNION AND MINNESOTA CIVIL LIBERTIES UNION IN SUPPORT OF APPELLANTS

LAURENCE H. TRIBE, *Counsel of Record*
MARTHA MINOW
KATHLEEN SULLIVAN
Griswold Hall 307
Cambridge, Massachusetts 02138
(617) 495-4621

BURT NEUBORNE
ISABELLE KATZ PINZLER
E. RICHARD LARSON
CHARLES S. SIMS
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Counsel for *Amici*

QUESTION PRESENTED

Did the court below err in ruling that Minnesota's attempt to eliminate sex discrimination in public accommodations violated the associational rights of members of the Jaycees despite the fact that admitting women to full membership in the Jaycees would not interfere with the Jaycees' ability to advocate its traditional program of beliefs or ideas?

INDEX

TABLE OF CASES

INTEREST OF AMICI CURIAE*

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of over 250,000 members which is dedicated to protecting the fundamental rights of the people of the United States. The Minnesota Civil Liberties Union is the Minnesota state affiliate of the ACLU. The ACLU has been in the forefront in the defense of First Amendment rights, including the right to freedom of association which amici believe is improperly asserted by the appellee in this case.

One of the major civil liberties issues facing the United States is the elimination of all vestiges of racism and sexism, and the wholly justified demand of women and minorities for equal access to opportunities

---

* The parties have consented to the filing of this brief, and their letters of consent are being filed with the Clerk of Court pursuant to Rule 36.2 of the Rules of this Court.

from which they have been excluded. In numerous cases before this Court, the ACLU has challenged discrimination against minorities and women under the Fifth and Fourteenth Amendments, and has also urged the vigorous enforcement of civil rights laws designed to remedy the causes and effects of such prohibited and invidious discrimination.

SUMMARY OF ARGUMENT

I

Associational activity for the advancement or advocacy of beliefs and ideas and for their collective pursuit through group organization is fully protected by the First Amendment. Where state action curtails this protected right, it is properly subjected to strict judicial scrutiny.

The court below, however, erroneously enjoined the enforcement of a facially valid state anti-discrimination law that does not aim at the expression or advocacy of ideas or beliefs, does not make any content based distinction between prohibited and permitted associational or expressive activity, and has no substantial or even discernible effect on a group's political expression or advocacy. The court based its decision upon an unsupported hypothesis that the

systematic relegation of female members of the Jaycees to inferior roles within the organization was indispensable to the expression and advocacy of the organization's ideas and beliefs, none of which are remotely the province exclusively of men. By indulging in forbidden sex stereotyping, the majority below impermissibly refashioned the traditional shield of freedom of association into a sword against excluded or subordinated groups - an inversion which this Court has refused to sanction even where protected ideas about exclusionary practices were involved. Runyon v. McCrary 427 U.S. 160,176 (1976). Since the very purpose of freedom of association is the protection of minority views from suppression by the powerful, the concept cannot be impermissibly converted into a license to subordinate.

II

Because the law at issue here aims at eliminating sex discrimination, a goal wholly independent of speech or association, it can be sufficiently justified under United States v. O'Brien 391 U.S. 367,377 (1968) if it is within the constitutional power of the state and furthers an important or substantial governmental interest, if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on the alleged associational right is no greater than is necessary to the furtherance of that interest. Minnesota's goals of eliminating sex discrimination in businesses that sell goods or services to the public and of preventing the deprivation of personal dignity and securing of equal rights and overcoming economic disparities between the sexes are plainly substantial state

interests falling well within its constitutional power. Any constriction of the Jaycees' expressive and associational freedoms brought by enforcement of the Act, if indeed any such constriction could be identified at all, is surely no greater than necessary to achieve its anti-discriminatory purpose. Indeed, as the court below concedes, the state's central purpose here can be achieved only by forbidding the systematic subordination of women within organizations such as the Jaycees; any incidental infringement of associational rights is a necessary price, and in this case also a trivial one.

STATEMENT OF THE CASE

The issue in this case is whether the United States Jaycees' practice of relegating the women to whom it sells memberships to an inferior position within the organization -- by denying them the right that male members enjoy to vote, hold office, or receive awards[1] -- deserves immunity from a facially valid state anti-discrimination law[2] by virtue of the

---

1. The Jaycees' By-Laws provide for the admission only of "young men" to full "Individual" membership, allowing young women merely "Associate" membership without comparable rights.

2. The Minnesota Human Rights Act provisions whose application is at issue in this case prohibit, as an "unfair discriminatory practice," the denial of "full and equal enjoyment" of the "goods, services, facilities, privileges, advantages, and accommodations" of any "place of public accommodation" on the basis of "race, color, creed, religion, disability, national origin, or sex." Minn,. Stat. Ann. §§363.01 & §363.03. The Minnesota Supreme Court, on certification from the district court below, held the Jaycees a "place of public accommodation" within the meaning of this [cont'd. on next pg]

organization's purported First Amendment right of association. The majority of the court of appeals below, reversing the district court, found such immunity for the Jaycees' discriminatory practice. United States Jaycees v. McClure, 709 F.2d 1560, 1566-76 (8th Cir. 1983). The majority held that, although the Jaycees -- a 300,000 member organization which "'market[s]'" its memberships aggressively to the public, id. at 1569 -- is "not an intimate group" and is "hardly a private club," id. at 1571, its right to associate for the collective advancement of protected "belief and expression," id. at 1571, was impermissibly abridged by the state's requirement that it extend "full-fledged" membership to women as

---

state law -- based on the fact that it sells a "product" (leadership skills) to "customers" (those members of the public enticed to buy memberships). United States Jaycees v. McClure, 305 N.W. 2d 764, 769 (1981).

a condition of doing business in the state, id. Finding that women's full membership would inevitably "change...the Jaycees' philosophical cast" even though "the specific content of most of the resolutions adopted over the years has nothing to do with sex," id., the court of appeals majority concluded that the state's interest in preventing sex discrimination in public accommodations was insufficiently "compelling" to override the Jaycees' associational rights, id. at 1572-73. The outer boundary of the state's power to enforce its interest, the majority suggested, was to be drawn at such "less... intrusive" and concededly "less...effective" means as urging state officials not to patronize discriminatory organizations like the Jaycees. Id. at 1573. The dissent, in contrast, would have found that the state's "compelling interest in eradicating second-

class citizenship in places of public accommodation" easily overwhelmed any rights the Jaycees might claim against a statute whose enforcement threatened neither the associational purpose of the organization--which embrace interests "not solely 'young men's'" Id. at 1580 (Lay, C.J., dissenting) -- nor the exercise of the organization's "speech and advocacy of public causes," id.[3]

---

3. The majority of the court of appeals also ruled, in the alternative and again over Judge Lay's dissent, that the Minnesota law was void for vagueness because lacking an "ascertainable standard for the inclusion of some groups as 'public' and the exclusion of others as 'private'." 709 F.2d at 1578. This ruling is so flatly wrong as to require little discussion. The prohibition of invidious discrimination enacted in the Minnesota Human Rights Act plainly does not directly infringe the speech or advocacy of the Jaycees or any other group as such. Nor does it indirectly infringe any interest legitimately protected by the First Amendment. see Argument infra. Since the law thus does not reach a substantial amount of constitutionally protected conduct, it must be shown "impermissibly vague in all of its applications" before it can be voided for vagueness. See Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S 489, 497 (1982). Such a showing would be [cont'd. on next pg]

ARGUMENT

Introductory Statement

The occasional tension between associational freedom and equality is no stranger to this Court. Whether it has arisen in the context of employment[4], housing[5], education[6] or access to public

---

impossible with respect to a distinction as long-applied and well-defined by both state and federal courts as that between public accommodations from which invidious discrimination may be banned and private groups from which it may not. See 709 F.2d at 1582 (Lay, C.J., dissenting).

4. Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945) (exclusion of Blacks from labor union); Hishon v. King & Spaulding, No. 82-940, appeal pending (exclusion of women from opportunity to become partner in law firm). Cf. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

5. Hurd v. Hodge, 334 U.S. 24 (1948) (unenforceability of racial restrictive covenants); Jones v. Alfred H. Mayer, 392 U.S. 409 (1968), Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (racial discrimination in sale or rental of private housing). See, 42 U.S.C. §§3601 et. seq. (1970 & Supp. V 1975).

6. Runyon v. McCrary, 427 U.S. 160 (1976) (racial discrimination in admission to [cont'd. on next pg]

accommodations [7], individuals have attempted to avoid democratic judgments condemning discrimination by alleging a constitutionally protected freedom to associate - and to refrain from associating - with persons of their choice.

Taken literally, of course, such an unbounded freedom to dis-associate would cripple the guarantees of equality contained in the Constitution and our Civil Rights statutes, since every ban on discrimination would be checkmated by an assertion of individual autonomy phrased as a claim of associational freedom. On the other hand,

---

private school). See also, Norwood v. Harrison, 413 U.S. 455 (1973); Goldsboro Christian Schools, Inc. v. United States, 103 S.Ct. 2017 (1983).

7. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung 379 U.S. 294 (1964); Daniel v. Paul, 395 U.S. 298 (1969); Tillman v. Wheaton-Haven Recreation Ass'n., 410 U.S. 431 (1973) (racial discrimination in access to public accomodations). See also, The Civil Rights Cases, 109 U.S. 3 (1883).

claims of associational freedom cannot be rejected out of hand, since, in certain circumstances, associational freedom is critical to the preservation of political[8], religious[9] and personal[10] freedom.

Not surprisingly, therefore, when associational freedom has been urged as a counterweight to a democratic condemnation of discrimination, this Court has uniformly rejected the challenge when the challengers were unable to prove that the prohibition on discrimination threatened their political, religious or personal freedom. Thus, in Railway Mail Ass'n. v. Corsi, 326 U.S. 88

---

8. Eg. NAACP v. Alabama, 357 U.S. 449 (1958); NAACP v. Button, 371 U.S. 415 (1963).
9. Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972); United States v. Lee, 455 U.S. 252 (1982).
10. Moore v. City of East Cleveland, 431 U.S. 494 (1977); Griswold v. Connecticut, 381 U.S. 479 (1965); Loving v. Virginia, 388 U.S. 1 (1967). See Meyer v Nebraska, 262 U.S. 390 (1923) ; Pierce v. Society of Sisters, 268 U.S. 510 (1925).

(1945), the Court rejected an argument that a prohibition on racial discrimination in labor union membership violated the white members' associational freedom. Similarly, in Runyon v. McCrary, 427 U.S. 160 (1976), the Court rejected an argument that a ban on racial discrimination in admission to private schools violated the associational rights of white parents. In both Corsi and Runyon, the Court recognized that a claim of associational right which is not tied closely to the enjoyment of political or religious[11] liberty is, in essence, a general claim of autonomy; a claim to be free of the regulatory reach of the law. It is a claim that courts may honor when personal bonds of transcendant significance are at stake.[12] It is not a claim, however,

---

11. The mere assertion of even a religious claim to autonomy does not assure exemption. United States v. Lee, 455 U.S. 252 (1982).

12. Eg. Moore v. City of East Cleveland, [cont'd. on next pg]

that can be plausibly asserted by members of a mass nationwide association devoted to the development of leadership skills and business acumen.

Indeed, the labored attempt by the majority below to establish a nexus between the Jaycees' political goals and the exclusion of women from full membership exposes the inherent weakness of the Jaycees' assertion of associational freedom. Since, as all concede, the Jaycees' political program does not advocate male supremacy or superiority, the admission of women as full members cannot impact on the political freedom of male Jaycees - unless one assumes that women Jaycees as a group will express differing political views merely because of their sex. The majority below appears to have harbored such an outdated - and unconstitutional -

---

431 U.S. 494 (1977).

stereotypical view of women. Compare, Schlesinger v. Ballard, 419 U.S. 498, 508 (1975). If, however, one assumes that individual women who join the Jaycees will express themselves as individuals and not as female robots, the ephemeral nexus constructed by the majority below disappears, leaving no basis whatever for a serious claim of associational freedom from a ban on sex discrimination.[13]

13. Even if one were to accept the possibility that admitting women might change the political complexion of the Jaycees -- a wholly unsupportable assumption -- the burden of proving impact on political association rests clearly with the Jaycees. Buckley v. Valeo, 424 U.S. 1 (1976); Brown v. Socialist Workers Party, 103 S.Ct. 416 (1982). Whatever the size of the burden, it cannot possibly be satisfied by stereotypical speculation about how women as a group might vote if admitted to full membership in the Jaycees.

I. IN ERRONEOUSLY APPLYING STRICT SCRUTINY TO THE ENFORCEMENT OF AN ANTI-DISCRIMINATION STATUTE AIMED AT NEITHER EXPRESSION NOR ADVOCACY, NOR AT THEIR COLLECTIVE PURSUIT THROUGH GROUP ORGANIZATION, THE COURT BELOW IMPERMISSIBLY CONVERTED THE FREEDOM TO ASSOCIATE INTO A LICENSE TO SUBORDINATE.

Associational activity "for the advancement of beliefs and ideas," NAACP v. Alabama, 357 U.S. 449, 460 (1958), and for the advocacy of collective interests, see NAACP v. Button, 371 U.S. 415, 430 (1963), is fully protected by the First Amendment. See, e.g., Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981); Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam). Such protection has long been viewed as essential to preserve diversity in our society by shielding minority and dissident expression and advocacy from suppression by the majority. See, e.g., NAACP v. Button, 371 U.S. at 431 (protection of minority group advocacy helps to

vindicate "the distinctive contribution of a minority group to the ideas and beliefs of our society"); NAACP v. Alabama, 357 U.S. at 462 (associational freedom especially important where group espouses dissident belief). Where state action curtails such collective expression or advocacy, it is accordingly "subject to the closest scrutiny."Id. at 460-61.

Where, in contrast, a group's associational expression or advocacy is at most only marginally affected -- as the Jaycees claim it to be here by a facially valid state anti-discrimination law that neither aims at the expression or advocacy of any ideas or beliefs, nor makes any content-based distinction between prohibited and permitted associational or expressive activity -- strict scrutiny is utterly inappropriate unless the alleged infringement would demonstrably threaten the

group's expressive enterprise. cf. Brown v. Socialist Workers Party, 103 S.Ct. 416 (1982) (immunity from membership disclosure rule). The court below purported to find just such a threat to the Jaycees' "political and ideological" enterprise posed here by the state's conditioning the Jaycees' doing business in the state upon its equal treatment of women and men. See 709 F.2d at 1517-7.[14] Specifically, the court found that application of the anti-discrimination statute to the Jaycees would "go[] to the heart of" its associational liberty by preventing it from continuing

14. Nothing in the court's decision turned on any notion that the Jaycees enjoyed a fundamental right to intimate association, see Moore v. City of East Cleveland, 431 U.S. 494 (1977) (extended family); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (marriage) -- a right the Jaycees could hardly colorably assert in light of the large size of even its local chapters (see JSA at A-93), and the impersonal and unselective nature of its growth through sales of memberships for a fee.

what the court viewed as its central expressive mission: "advanc[ing] the interests of young men," and affirming the "'brotherhood of man,'" see id. at 1571 [emphasis added].

Nothing in the record below, however, supports the court's bold "hypothesis," see id. at 1581 (Lay, C.J. dissenting), that the systematic relegation of female members of the Jaycees to inferior roles within the organization is indispensable to -- or indeed, even relevant to -- the expression and advocacy which the Jaycees is organized to advance. Among the very Jaycee activities adduced in the record which the court stresses are so "political and ideological" as to trigger First Amendment protection in the first place -- for example, the Jaycees' advocacy against government deficits, for the disabled, for school prayer, and for the economic

development of Alaska, id, at 1569 (majority opinion) -- none can remotely be said even to involve interests exclusively the province of men. A fortiori, the subordination of women within the Jaycees cannot be said to advance the organization's articulation and advocacy of its positions on such matters. It is simply not as and for men, but as and for civic and business leaders, that the Jaycees pursue such associational advocacy.

By ignoring the obvious inference from the record that the Jaycees' associational advocacy, as the majority below itself conceded, "has nothing to do with sex." id. at 1571, and by casting about instead for its own link between the Jaycees' expression of ideas and its rationale for subordinating women to men, the court below not only violated its obligation to govern

evenhandedly,[15] but also impermissibly refashioned the traditional shield of associational freedom into a novel sword against excluded or subordinated groups -- an inversion this Court has long refused to sanction even where protected ideas about exclusionary practices were involved as they have not been shown to be here.

For example, while parents may assert under the First Amendment a "right to send their children to educational institutions that promote the belief that racial segregation is desirable," this Court has stated that "it does not follow that the practice of excluding racial minorities from

---

15 Indeed, the court's surmise that women, if elected to full Jaycee membership, would betray a different "attitude of mind" about economic justice, see 709 F.2d at 1571 -- whatever the court might mean -- amounts to unconstitutional adjudication by archaic sexual stereotype. See Schlesinger v. Ballard, 419 U.S. 498, 508 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

such institutions is also protected by the same principle." Runyon v. McCrary, 427 U.S. 160, 176 (1976). Cf. Railway Mail Ass'n v. Corsi, 326 U.S. 88, 94 (1945)(rejecting a claim of associational protection for a labor union's effort to exclude Black members as a distortion of the Fourteenth Amendment, which was enacted to bar state discrimination). Indeed, where such exclusionary practices have been involved, this Court, far from allowing such casual inferences of loose nexus between forbidden discrimination and protected association as the court made here, has required a clear showing of close nexus: namely, a showing that "discontinuance of discriminatory admission practices would inhibit" the expression of ideas by an association's membership. See Runyon v. McCrary, 427 U.S. at 176. By applying strict scrutiny on the basis of a mere

hypothesis of such a nexus, the court below turned the very purpose of the freedom of association -- the protection of minority views from suppression by those relatively more powerful -- impermissibly on its head, finding in the freedom to associate a boundless license to subordinate.

II. THE MINNESOTA ANTI-DISCRIMINATION STATUTE VIOLATES NO EXPRESSIVE OR PROTECTED ASSOCIATIONAL RIGHT, FOR IT ADVANCES A SUBSTANTIAL STATE INTEREST WHOLLY UNRELATED TO RESTRICTING SPEECH OR ASSOCIATION, AND ITS INCIDENTAL IMPACT ON ASSOCIATION IS BOTH TRIVIAL AND NO GREATER THAN NECESSARY.

Because the Minnesota law at issue here, as noted above, does not directly aim at the expression of ideas or at associational advocacy, nor even discernibly infringe those activities indirectly, but aims rather (in relevant part) at eliminating sex discrimination -- a goal wholly independent of speech or association -- the Jaycees' claim that the law infringes

their associational rights can properly be tested pursuant to a standard of review far more relaxed than that applied by the court below -- namely, by the standard of review announced in United States v. O'Brien, 391 U.S. 367, 377 (1968):

> [W]e think it clear that the government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

This standard is amply met here.

First, the Minnesota Act's goal of eliminating sex discrimination in businesses that sell goods or services to the public -- as the Jaycees sell memberships and their attendant benefits -- is plainly a substantial state interest falling well

within a state's constitutional power.[16] Securing equal rights of access, regardless of sex -- to public accommodations, no less than to education, employment, housing, and credit -- is a central commitment of numerous statutory schemes, both state and federal because preventing the "deprivation of personal dignity [that] surely accompanies denial of equal access to public establishments," see Heart of Atlanta Motel v. United States, 379 U.S. 241, 250

16. That the state here claims the power to forbid sex discrimination in businesses and facilities qualifying as "places of public accommodation" in no way entails that the state would have a federal constitutional duty to do so. Nor does the fact that a business like the Jaycees' may be public enough to come legitimately within the state's regulatory power entail that the state's failure to ensure equal access to membership regardless of sex would amount to discriminatory state action. Thus the outer contours of state action in the context of social, fraternal, or recreational associations, see e.g., Moose Lodge v. Irvis, 407 U.S. 163, 173, 177 (1972); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 437 (1973), need not be reached or even considered here.

(1964)(race discrimination), advances a legitimate and important state interest in remedying discrimination. Nor is the state interest lessened when the denial of equal public access consists, as here, of admission on subordinate terms that earmark one as a second-class citizen. Cf. Railway Mail Ass'n v. Corsi, 326 U.S. at 94. Moreover, securing equal rights of access for women to the traditionally male-only civic and business privileges of a public organization such as the Jaycees advances a legitimate and substantial state interest in overcoming economic disparities between the sexes. See, e.g.,Califano v. Webster, 430 U.S. 313 (1977) (per curiam).

Second, whatever marginal constriction of the male Jaycees' expressive and associational freedoms enforcement of the Act might bring about incidental to its elimination of a sex-discriminatory practice,

that constriction is surely no greater than necessary to achieve its anti-discriminatory purpose.

It is difficult, in fact, to identify any such constriction. The state has not required the Jaycees to change or forego any creed, message, or political activity. See United States v. Int'l Longshoreman's Ass'n, 460 F.2d 497, 501 (4th Cir.), cert. denied, 409 U.S. 1007 (1972). And any claim of state infringement of symbolic messages that might be conveyed by Jaycee membership practices would be dubious at best in light of the fact that the Jaycees already voluntarily solicit and admit women members to enjoy its social activities, to accede to its creed, to learn its philosophy, and to participate in its leadership-training and community-service activities -- in short, to participate in most Jaycee collective activities so long as those activities are chosen and governed

solely by men, who alone have the power to vote and hold office. Any message to the effect that "women cannot and should not be civic and business leaders" is simply not one that the Jaycees seek collectively to promulgate.[17]

Moreover, the Jaycees' associational interest in advocating on behalf of "young men" -- the interest focused on by the court below -- must be viewed as at best tangential to an organization that already admits women and that advocates a host of political, economic, and spiritual messages utterly unrelated to the sex of their proponents; any infringement of this interest by elevation of women to full membership in the Jaycees must

---

17. The question whether such an associational creed might ever suffice to justify the exclusion or subordination of women, like the question whether an association formed around a creed of white supremacy might ever have First Amendment immunity from a state law barring denial of access by blacks on an equal basis, therefore need not be reached here.

similarly be viewed as at best attenuated since there can be no guarantee, even if people did vote with their sex, that those women who wish to join the Jaycees would in fact vote for anything that did not advance the interests of young men as the Jaycees has traditionally conceived them. In short, the Jaycees have suggested no infringement here that even mildly threatens its "institutional viability," cf. Pittsburgh Press, 413 U.S. at 382.

In contrast, the state's central purpose here -- the elimination of sex discrimination in those businesses and facilities that open themselves to the state's public -- can be achieved only by forbidding the systematic subordination of women within such organizations; any incidental infringement of associational rights is simply a necessary price, if in this case also a trivial one. No less could the systematic subordination of

women as associate employees of law partnerships be achieved without some necessary incidental infringement of the partners' associational freedom to promote and enjoy co-ownership and governance only with other men. Cf. Hishon v. King & Spaulding, No. 83-940, appeal pending. No "less restrictive" alternative sufficient to achieve the state's ends is realistically imaginable.[18]

---

18. The suggested "less restrictive" means conjured by the court below, see 709 F.2d at 1573, for increasing the desegregation of the Jaycees must in any event be dismissed as ineffectual to accomplish the state's goals, as the court itself conceded, id.

CONCLUSION

For the above-stated reasons, the decision of the Court below should be reversed.

Respectfully submitted,

LAURENCE H. TRIBE,
Counsel of Record
MARTHA MINOW
KATHLEEN SULLIVAN
Griswold Hall 307
Cambridge, Mass. 02138
(617) 495-4621

BURT NEUBORNE
ISABELLE KATZ PINZLER
E. RICHARD LARSON
CHARLES S. SIMS
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800
Counsel for Amici